No. 97-1945

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

SANDRA LEA BENEDICT,

Petitioner,

v.

EAU CLAIRE PUBLIC SCHOOLS,
WISCONSIN EDUCATION ASS'N COUNCIL,
THOMAS BLOUNT, MICHAEL BURKE,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

# REPLY BRIEF OF PETITIONER

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## QUESTIONS PRESENTED FOR REVIEW

I. WHETHER FEDERAL AND STATE QUESTION CLAIMS UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) (42 U.S.C.A. 12101 et seq.) AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) (29 U.S.C.A. 621 et seq.) VIOLATES DUE PROCESS AND IS THEREFORE UNCONSTITUTIONAL.

II. WHETHER AS APPLIED IN THIS CASE THE U.S. DISTRICT COURT AND APPELLATE COURT VIOLATED DUE PROCESS RIGHTS BY INVOKING THE PRESUMPTION BY EGREGIOUS AND EXTRAORDINARY PROOF REQUIRED BY THE APPELLATE COURT AND U.S. DISTRICT COURT TO REBUT THE PRESUMPTION OF ADA AND ADEA CLAIMS IS UNCONSTITUTIONAL.

III. WHETHER AS INTERPRETED BY THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) (42 U.s.c.a. 12101 et seq.) AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) ( 29U.S.C.A. 621 ET SEQ.) IS REALLY A CONCLUSIVE PRESUMPTION, AND THUS, VIOLATES DUE PROCESS.

IV. WHETHER THE SUPREME COURT UPHOLDS THAT A COMPLAINT NOT BE DISMISSED FOR FAILURE TO STATE A CLAIM UNLESS IT APPEARS BEYOND DOUBT THAT NO SET OF FACTS CAN BE PROVEN IN SUPPORT OF CLAIM WHICH ENTITLES RELIEF.

V. WHETHER THE UNITED STATES COURT OF APPEALS DIVESTS THE DISTRICT COURT OF JURISDICTION OVER THOSE ASPECTS OF THE CASE INVOLVED IN THE APPEAL BY THE FILING OF A NOTICE OF APPEAL.

## LIST OF PARTIES
## TO THE PROCEEDINGS
## IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Seventh Circuit.

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## OPINIONS BELOW

The February 10, 1998 Judgment Order of the Seventh Circuit Court of Appeals, whose judgment is herein sought to be reviewed, is at No. 97-2513, is unpublished and is reprinted in Appendix A to this Petition ("Appendix A") at pp. A2. The Order of March 5, 1998 of the Seventh Circuit Court of Appeals for denial of rehearing is reprinted in Appendix A at p. A22. The Order of March 6, 1998 of the Seventh Circuit of Appeals for denial of Motion for Stay of Mandate is reprinted in Appendix A at pp. A23. The prior, Memorandum and Order of the Honorable John C. Shabaz of the United States District Court for the Western District of Wisconsin, entered March 19, 1996 at No. 95-C-568-S, is reprinted in Appendix A at pp. A31. The prior April 24, 1996 Memorandum and Order of the Honorable John C. Shabaz of the United States District Court for the Western District of Wisconsin at No. 95-C-568-S is reprinted in Appendix A at pp. A37. The prior October 2, 1996 Order of the Honorable John C. Shabaz of the United States District Court for the Western District of Wisconsin at No. 95-C-568-S is reprinted in Appendix A at pp. A40. The prior May 7, 1997 Order of the Honorable John C. Shabaz of the United States District Court for the Western District of Wisconsin at No. 95-C-568-S is reprinted in Appendix A at pp. A42. The June 17, 1997 Order of the Honorable John C. Shabaz of the United States District Court for the Western District of Wisconsin at No. 95-C-568-S is reprinted in Appendix A at p. A44. The December 5, 1996 Decision and Order of the Honorable John L. Brown, Administrative Law Judge for the State of Wisconsin, Department of Workforce Development, Equal Rights Division at ERD Case No. 199504328 and EEOC Case No. 260960026 is reprinted in Appendix A at pp. A46, along with attached Certification of the Hearing Section, Equal Rights Division, p. A55. The March 20, 1998 Order of the Honorable Jerome J. Berkowitz, Administrative Law Judge for the Social Security Administration, Office of Hearings and Appeals is reprinted in Appendix A at p. A56.

## JURISDICTION

The United States Supreme Court has jurisdiction according to 28 U.S.C. 1257 which states in pertinent part: (a) Final judgments or decree rendered by the highest Court in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the grounds of it being repugnant to the constitution, treaties, or laws of the United States.

This court also has jurisdiction under 28 U.S.C. 1257 due to fact Petitioner exhausted her remedies on the issues raised by this petition.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action was also filed pursuant to the Fourteenth Amendment of the United States Constitution and the Rehabilitation Act, 29 U.S.C.A. 794. The pertinent sections of these constitutional and statutory provisions are set forth in the Appendix A at p. A57, Writ of Certiorari.

This action was further filed pursuant to the Americans with Disabilites Act (ADA), 42 U.S.C. 12101 et. seq. and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 et. seq. The pertinent sections of 29 U.S.C.A. 623(a)(1), 29 U.S.C.A. 623(d), 42 U.S.C.A. 12111(9), 42 U.S.C.A. 12102(2), 42 U.S.C.A. 12111 (8), 42 U.S.C.A. 12111(10)(A), 42 U.S.C.A. 12112(a), 42 U.S.C.A. 12112(b)(5), and 42 U.S.C.A 12203(a) of these constitutional and statutory provisions are set forth in the Appendix A at p. A57, Writ of Certiorari.

This action was filed pursuant to 42 U.S.C.A. 1983 on the basis that the second federal policy underlying 1983 Civil Rights actions is compensation for victim who has suffered violation of his/her Civil Rights.

## STATEMENT OF FACTS

Petitioner alleges that her employer Eau Claire Public Schools and WEAC Labor Union interfered with her rights as their employee to file a charge or to participate in EEOC hearings, ERD hearings, investigations, or other proceedings under the ADA, Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, or the Equal Pay Act. These are non-waivable rights built upon the premise that (a) interference with these protected rights is contrary to public policy; and (b) the anti-retaliation provisions of the civil rights statutes prohibit such conduct.

Petitioner claims that defendants have discriminated against her on the basis of her disability and age with respect to the terms, conditions, and privileges of her employment and labor organization membership as prohibited by the Americans with Disabilities Act (ADA) 42 U.S.C. 12101 et. seq. and the Age Discrimination Act (ADEA), 29 U.S.C. 621 et. seq., as well as treating her and disciplining her more harshly and retaliating against her due to her handicap for filing a complaint against her employer and her union previously for being treated less favorable than others because of her protected class in reference to discrimination in layoff/firing, job assignments, leave or benefits and training. Petitioner believes she was retaliated against for asserting her rights under fair employment law for open records of Title I with U.S. Inspector General.

## SUMMARY OF ARGUMENT

Petitioner's arguments have proven that (1) Petitioner is disabled within the meaning of the ADA, and (2) Respondents discriminated against her unlawfully on the basis of her disability and age, and therefore, is liable for all of the damages she is entitled to under the law, together with court costs and attorney's fees.

## REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES SUPREME COURT HAS JURISDICTION.

28 U.S.C. 1257 states in pertinent part:

> (a) Final judgments or decree rendered by the highest Court in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the grounds of it being repugnant to the Constitution, treaties, or laws of the United States ...

This case involves the validity of a state statute on the grounds of its being repugnant to the Constitution. Petitioner asserts that under the Americans With Disabilities Act (ADA) (42 U.S.C.A. 12101 et seq.) and the Age Discrimination In Employment Act (ADEA) (29 U.S.C.A. 621 et seq.) a conclusive presumptionby the Appellate Court to rebut ADA and ADEA claims is unconstitutional and thus, violates due process and as it was applied in this case.

Petitioner's case was dismissed on summary judgment. The appellate court, on its own, decided the case based on its definition of the quantity, and quality of proof necessary to rebut the presumption.

In a Petition for Rehearing to the appellate court, petitioner raised the issues of the unreliability of the assumptions used to determine ADA and ADEA claims in upholding a grant of summary judgment.

To uphold a grant of summary judgment, this court must view the record and all reasonable inferences from it in the light most favorable to the party opposing the

the motion, Petitioner. The court must then conclude that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. "Summary judgment is only appropriate when the record reveals that no reasonable jury could find for the moving party." McCoy v. WGN Continental Broadcasting Co., 957 F. 2d 368, 370 (7th Cir. 1992). On summary judgment motions, a court cannot make credibility determinations nor choose between competing inferences as these are functions of the jury. Sarsha v. Sears Roebuck & Co., 3 F. 3d 1035, 1041 (7th Cir. 1993).

This standard is applied with increased rigor in employment discrimination cases, where intent and credibility are the central issues. Id. at 1038. "Because evidence directly supporting a claim of intentional discrimination is rare, affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination." Courtney v. Biosound, Inc., 42 F. 3d 414, 418 (7th Cir. 1994). The nonmoving party's own affidavit or deposition can constitute affirmative evidence to defeat a summary judgment motion. Furthermore, a grant of summary judgment which turns on the issue of discriminatory intent must be approached with extra caution. Id. at 423.

In this case, Petitioner has provided sufficient evidence to defeat defendant's motion for summary judgment. Specifically, the affidavits and supporting documentation offered by Petitioner has raised material issues of fact regarding alleging discrimination have to be determined and it appears that summary judgment did not get at the facts per se. Therefore, a trial is needed to substantiate the disputed facts.

Petitioner believes that summary judgment to be granted for defendant's counterclaim that where the genuine issues of fact that existed and still continues to exist is irrelevant and immaterial appears to be incorrect since it assists in determining whether a violation of the applicable Federal Act has occurred and will violate Petitioner's due process as it applies to this case.

Plaintiff believes that summary judgment is not a substitute for a court or jury trial of any issue of material fact that is subject of a genuine dispute. See 56.04(1), 56.17 (18), 56.18, 56.19, 56.20.

The jurisdiction of the United States Supreme Court does not depend on whether the state court addressed the federal question. It is enough that the federal claim was made and not accepted. (Lynk v. La Porte Superior Court No. 2, 789 F.2d554 (7th Cir. 1986). Furthermore, when the Court of Appeals for the Seventh Circuit denied a Petition for Review, it is to be assumed that the court has been given fair opportunity to review the merits of the petitioner's claim, for purposes of exhaustion of state court remedies. (Roman v. Estelle, 917 F.2d 1505 (9th Cir. 1990). The issues have been raised, preserved, and passed upon by the State Administrative Law Judge in his Decision and Order stating:

Meanwhile, on October 2, 1996 the federal district court issued its jugment dismissing the federal lawsuit, and Benedict is now pursuing an appeal to the Seventh Circuit.

Based on the dismissal of the federal claims by the federal district court, the school district seeks to have the ERD complaint dismissed on grounds of resjudicata, or claim preclusion.

As to whether there has been a judgment on the merits, it appears that the granting of a summary judgment in the school district's favor went to the merits of Benedict's case, even though it resulted in a pretrial disposition. There is a clear consensus in both the Labor and Industry Review Commission and the Wisconsin appellate courts that a judgment on the merits does not require a trial. Maguire v. Marquette University (LIRC, 08/18/88); Byrne v. West Allis-West Milwaukee School District (LIRC, 09/18/91); Bourque v. Wausau Hospital Center (LIRC, 04/02/92); DePratt, supra at 311. In Maguire, LIRC looked to the Seventh Circuit for guidance in determining what a judgment on the merits was for purposes of res judicata.

The Order of Judge Shabaz granting summary judgment in Petitioner's federal case was clearly based on an assessment of Petitioner's legal rights, and was not a matter of practice, procedure, jurisdiction or form. It was, therefore, a judgment on the merits for purposes of res judicata.

This court has jurisdiction under 28 U.S.C. 1257 because Petitioner exhausted her state court remedies on the issues raised by this petition. Therefore, Respondent's claim that this court does not have jurisdiction of this petition is erroneous.

II. THE STATE COURT'S DECISION IS VALID IF, AND ONLY IF, THE AMERICANS WITH DISABILITIES ACT ("ADA"), 42 U.S.C. 12101 ET. SEQ. AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT ("ADEA"), 29 U.S.C. 621 ET. SEQ.IS VALID.

Considering that the Wisconsin Fair Employment Act and Title VII serve identical purposes, it is appropriate to consider federal decisions, although such decisions are not binding and must be disregarded if they conflict with our legislature's intent in enacting the Wisconsin Fair Employment Act. Marten Transport v. DILHR, 176 Wis. 2d 1012, 501 N.W. 2d 391 (1993).

As a general guidance principle, Wisconsin courts look to federal decisions interpreting Title VII for guidance in applying the state employment law. However, the state court must construe Wisconsin statutes as it is believed the Wisconsin legislature intended, regardless of how Congress may have intended that comparable statutes be interpreted. Moore v. LIRC, 175 Wis. 2d 561, 499 N.W. 2d 289 (Ct. App. 1993). Wisconsin courts have at times looked to federal employment law for guidance in considering discrimination claims under the Wisconsin Fair Employment Act.

Remedies under Title VII and the Wisconsin Fair Employment Act are to be pursued separately and, in applying the WFEA, the provisions of Title VII should not be automatically incorporated. AMC v. DILHR (Bartell), 101 Wis. 2d 337, 305 N.W. 2d 62 (1981).

The decision reached by a federal court in a Title VII suit is not res judicata in a complaint filed under the Act. The statutes express an intent to accord parallel or overlapping remedies and the identity of issues necessary for res judicata is absent when the two laws have not been similarily interpreted. Ruberstein v. LIRC (UW-Board of Regents) (Dane Co. Cir. Ct., 08/15/80).

Petitioner is challenging the district court's dismissal of her claims against WEAC Labor Union for failure to serve the Summons and Complaint. There are claims pending against WEAC that can provide a basis for appeal. Since Attorney Arellano never amended the original complaint, Petitioner submitted Motion Pursuant to Rule 12(b)(6) or 12(c) Federal Rules of Civil Procedure and Motion for Rule 42(b). Since WEAC's dismissal was without prejudice, WEAC should not be dismissed from this appeal because a basis exists for the appeal.

There are numerous reasons why Blount and Burke need to be included in this case. (1) They were named in the Summons and Complaint and served in a timely fashion (see Order dated February 9, 1996). Attorney Arellano proposed a Stipulation to Dismiss Blount and Burke from this case, with prejudice and without costs. Petitioner objected to this Stipulation and refused to sign it in March of 1996 and requested that Attorney Arellano dismiss without prejudice. Attorney Arellano stated to Petitioner that it would be taken up in a different forum and he would only continue as Petitioner's Attorney if it were signed.

A Motion For Appeal by Petitioner and A Notice of Apeeal *Interlocutory* was filed on May 20, 1996. On May 22, 1996, an order was issued that Petitioner's appeal was premature and would not proceed (filed 5-21-96). A Notice of Appeal by Petitioner was filed by Attorney Thomas Arnot on May 22, 1996 with no fee paid, no Docketing Statement filed (96-2300). On May 30, 1996 a Stipulation and Order For Dismissal of Thomas Blount and Michael Burke was mailed by Circuit Court. On June 19, 1996, an Order was issued from the United States Court of Appeals that Appeal Case (96-2275) was dismissed.

Petitioner believes that according to Espinueva v. Garrett, 895 F2d. 1164 (7th Cir. 1990); Cir. R. 3(c), 28(b) and (c), every litigant has an obligation to bring both appellate and district court jurisdictional problems to the court's attention.

In Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982); Ced's Inc., filing a Notice of Appeal divests that district court of jurisdiction over those aspects of the case involved in the appeal. Since the Notice of Appeal by Petitioner was docketed on May 20, 1996, Petitioner believes and interpretes the Voluntary Dismissal of Blount and Burke signed by the district judge, Honorable John C. Shabaz to be considered null and void due to the fact that the district court did not retain the jurisdiction, so the court surrendered its jurisdiction over Petitioner's claims against Blount and Burke when it was signed in the May 30, 1996 Order. See McCall-Bey v. Franzen, 777 F. 2d. 1178, 1184 (7th Cir. 1985).

Petitioner believes that according to FRAP 42 Voluntary Dismissal in the District Court, if an appeal has been docketed, the appeal may not be dismissed by the district court upon the filing in that court of a stipulation for dismissal signed by all parties of which Attorney Joel Aberg never did sign, or may not upon motion and notice by the appellant.

Petitioner believes that according to FRAP 42 Voluntary Dismissal in the Court of Appeals, that the parties to an appeal or other proceeding such as ERD proceedings must sign and file with the clerk of the court of appeals an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and must be agreed upon by the parties or fixed by the Court of Appeals. No agreement existed that was signed or filed with the clerk of the Court

of Appeals nor did Petitioner receive notification from the clerk of the Court of Appeals that the case was dismissed due to the fact that as per Order from United States Court of Appeals dated September 18, 1996, the following reads:

> At the time the notice of appeal was filed, the case against defendants Tom Blount and Michael Burke was still proceeding before the District Court. Accordingly, the subsequent dismissal of those two defendants did not cure the jurisdictional defect to Federal Rule Appellate Procedure 4(a)(2), as the District Court Order dismissing the two defendants was both announced and entered on the court's docket after the notice of appeal had been filed.
>
> The court also notes that it is unclear whether the claims against the defendants, other than Eau Claire Schools, Mr. Blount and Mr. Burke have been resolved. This appeal is therefore premature and is DISMISSED for lack of jurisdiction.

Petitioner believes that Blount, WEAC Union President and Burke, NUE Attorney for WEAC Union were WEAC Union since pro se litigant understood that these individuals were professionals with knowledge of Union law and/or procedures. Therefore, Petitioner still contends that since proof of service for Tom Blount and Michael Burke which are officers of the WEAC Union default judgment should be entered against them for not responding to Petitioner's complaint which was served on these defendants on November 29, 1995. The Order was dated on February 9, 1996. On February 8, 1996 Petitioner moved for default against the WEAC Labor Union.

Petitioner believes that the Stipulation did not waive any right Petitioner had to continue litigation against Blount and Burke or to object to their dismissal now due to the fact that the district court did not retain jurisdiction, so the court surrendered jurisdiction over Petitioner's claims against Blount and Burke when it signed the May 30, 1996 Order. Petitioner objected to their dismissal before, objects to

their dismissal now and believes the Stipulation to be null and void due to the circumstances of Attorney Arellano's withdrawal of counsel.

## CONCLUSION

Petitioner believes that the District Court of Appeals retained jurisdiction and still continues this jurisdiction. Further, the doctrine of res judicata does not bar Petitioner's claims against Blount and Burke due to the stipulated dismissal because the parties to an appeal or other proceeding such as ERD Proceedings must be signed and filed with the clerk of the court of appeals an agreement that the proceeding be dismissed, specififying the terms as to payment of costs, and must pay whatever fees are due, the clerk must then enter the case dismissed, but no mandate or other process shall issue without an order of the court. No agreement existed that was signed or filed with the clerk of the Court of Appeals.

Petitioner objects to Blount and Burke's request for their attorneys' fees for Attorney John Finerty as well as with Eau Claire Public Schools Attorney Joel Aberg and Petitioner's Attorneys' Victor Arellano and Thomas Arnot as their sanctions against Petitioner due to the following reasons: (1) When the original stipulation was signed, Petitioner did not promise to end her case against Blount and Burke due to the many claims which were still unclear and pending. See letter to Attorney Arellano from Petitioner dated June 13, 1996 NOT abandoning WEAC Union claims. (2) Petitioner continues to litigate against Blount and Burke even after the appeal was filed; (3) Petitoner has also refused to take steps necessary to dismiss them from further litigation even after Blount and Burke offered another stipulation. Petitioner should not have to pay Blount's or Burke's attorneys' fees because no promise was breached due to the fact that the district court did not even have jurisdiction over the case because an appeal had already been docketed and too many issues remained unresolved.

For these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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